APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-070228
TRIAL NO. A-9111015

[Filed August 15, 2008]

DEBORAH FISHER,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
HARRY VAN LOVEREN, M.D.,	)
BRAD OSBORNE, M.D.,	)
MAYFIELD NEUROLOGICAL	)
INSTITUTE,	)
	)
and	)
	)
GOOD	)
SAMARITAN HOSPITAL,	)
	)
Defendants-Appellees.	)
	)

DECISION

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 15, 2008

John Metz, for Plaintiff-Appellant,

Rendigs Fry Kiely & Dennis, LLP., *Felix J. Gora*, and *Thomas M. Evans,* for Defendants-Appellees Brad Osborne, M.D., and Good Samaritan Hospital,

Reminger & Reminger Co., L.P.A., and *Vincent P. Antaki,* for Defendants-Appellees Harry Van Loveren, M.D., and the Mayfield Neurological Institute.

Note: We have removed this case from the accelerated calendar.

SUNDERMANN, Presiding Judge.

{¶1} Plaintiff-appellant Deborah Fisher appeals from the trial court's entries granting summary judgment to defendants-appellees Harry Van Loveren, M.D., Brad Osborne, M.D., Mayfield Neurological Institute, and Good Samaritan Hospital on her medical-negligence claims.

{¶2} On December 18, 1990, Fisher was admitted to Good Samaritan Hospital. On December 20, 1990, she underwent surgery to drain and remove a cystic tumor in her brain. The surgery was performed by Dr. Van Loveren, an employee of the Mayfield Neurological Institute, with the assistance of Brad Mullen, M.D., the chief neurological resident at Good

Samaritan Hospital and an employee at the University of Cincinnati. During her post-operative period, Fisher was under the care of Dr. Van Loveren, Dr. Mullen, Dr. Osborne, a first-year resident at Good Samaritan, and the nursing staff at Good Samaritan, when her neurological condition significantly deteriorated. Fisher suffered permanent and serious brain damage.

{¶3} In December 1991, Fisher brought suit against Dr. Van Loveren, Dr. Osborne, Dr. Mullen, Mayfield Neurological Institute, and Good Samaritan Hospital. She alleged that they had failed to properly respond to her deteriorating condition and to render the appropriate standard of needed medical care. Dr. Mullen immediately filed a motion to dismiss on the basis that he was a state employee of the University of Cincinnati. Fisher subsequently dismissed Dr. Mullen from the case and filed suit against the University of Cincinnati in the Court of Claims.

{¶4} In January 1998, the Court of Claims issued a decision holding that Dr. Mullen had acted within the scope of his employment with the University of Cincinnati when he had treated Fisher and that he was entitled to personal immunity pursuant to R.C. 2743.02(F) and 9.86 for any medical malpractice he had allegedly committed while treating Fisher. In August 1998, the Tenth Appellate District affirmed the judgment of the Court of Claims.[1] Fisher's suit against the University of Cincinnati is currently pending in the Court of Claims, but it has been stayed pending the outcome of this appeal.

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[1] *Fisher v. University of Cincinnati Med. Ctr.* (Aug. 25, 1998), 10th Dist. No. 98AP-142.

{¶5} In the meantime, Fisher's claims against the other defendants proceeded in the trial court. After lengthy discovery, all the defendants moved for summary judgment. On April 24, 1997, the trial court granted summary judgment to all the defendants except Good Samaritan Hospital. The trial court concluded that Fisher had failed to present any expert testimony that Dr. Van Loveren, Dr. Osborne, or the nursing staff at Good Samaritan Hospital had deviated from the appropriate standards of medical care. The trial court also granted summary judgment to the Mayfield Neurological Institute because the only claim against it had been predicated upon the doctrine of respondeat superior.

{¶6} The trial court, however, found sufficient evidence in the record to create a genuine issue of material fact as to the adequacy of care provided by Dr. Mullen. The trial court further found that Mullen's status as chief neurological resident at Good Samaritan Hospital arguably created an agency relationship with the hospital that was sufficient to overcome summary judgment. Shortly thereafter, Good Samaritan Hospital moved the trial court for reconsideration of its decision, which the trial court denied.

{¶7} In January 2005, Good Samaritan again moved for summary judgment, arguing that it could not be held vicariously liable for the actions of Dr. Mullen because he had been found to be a state employee immune from suit under R.C. 9.86 at the time of the alleged malpractice. The trial court denied its motion in August 2005 on the basis that there was an "apparent agency" between Dr. Mullen and Good Samaritan Hospital.

{¶8} In August 2006, Good Samaritan again moved for reconsideration of the court's ruling on its motion for summary judgment based upon the Ohio Supreme Court's decision in *Comer v. Risko*.[2] In March 2007, the trial court granted the motion on the basis that Good Samaritan's potential vicarious liability for Dr. Mullen's alleged malpractice had been extinguished when Dr. Mullen had been granted immunity under R.C. 2743.02(F) and 9.86 and that no liability could, therefore, attach to Good Samaritan under an apparent-agency theory.

{¶9} Fisher now appeals from each of the trial court's entries granting summary judgment to Dr. Van Loveren, Dr. Osborne, Mayfield Neurological Institute, and Good Samaritan Hospital. She raises four assignments of error for our review. Finding none of her assignments to be meritorious, we affirm the judgment of the trial court.

I. Standard of Review

{¶10} Summary judgment is appropriate when "(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse

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[2] 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712.

to that party."[3] We review a trial court's decision to grant a motion for summary judgment de novo.[4]

I. Dr. Van Loveren and Mayfield Neurological Institute

{¶11} In her first assignment of error, Fisher contends that the trial court erred in granting summary judgment to Dr. Van Loveren and the Mayfield Neurological Institute. Fisher makes three main arguments as to why summary judgment was improvidently granted. First, she argues that the affidavit and deposition testimony of her expert witness, Dr. L. David Rutberg, created a genuine issue of material fact about the care and treatment rendered by Dr. Van Loveren. Next, she contends that there was sufficient evidence to hold Dr. Van Loveren responsible for the actions of Dr. Osborne and Dr. Mullen. Finally, she argues that Dr. Van Loveren could be held liable for the incomplete medical record and the late creation of the operative note for her surgery.

{¶12} During Dr. Rutberg's deposition, his opinions, including those provided in two earlier affidavits, were discussed in detail. Dr. Rutberg was specifically asked about any criticism of Dr. Van Loveren, to which he responded in the negative. Specifically, the following discussions took place:

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[3] *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

[4] *Koos v. Central Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 641 N.E.2d 265.

{¶13} "Q. Doctor, do these appear to be the affidavits you executed?

{¶14} "A. Yes, sir.

{¶15} "Q. Other than what is stated in the affidavits, do you believe that the care provided by Dr. Van Loveren was within accepted medical standards?

{¶16} "A. Yes sir.

{¶17} "Taking a look at the affidavit of September 10, 1996, in paragraph seven or five- * * *

{¶18} "Q. Five.

{¶19} "A. Five. Okay.

{¶20} "Q. You state that, quote, The physicians and nurses responsible for Ms. Fisher on December 24, 1990 failed to render to Ms. Fisher the appropriate standard of care requisite under the circumstances on December 24, 1990. Do you recognize that it is acceptable to have residents respond to problems, and that residents have a duty to report significant findings to the attending physicians?

{¶21} "A. Yes.

{¶22} "Q. Do you agree, without such communication, the attending cannot be expected to be clairvoyant about what might be going on with the patient, and respond to it?

{¶23} "A. Yes.

{¶24} "Do you agree that after Dr. Van Loveren was notified of a problem, he responded promptly?

{¶25} "Yes, he did.

{¶26} * * *

{¶27} "Q. Within the context of your opinions stated in your affidavit as to care rendered by Dr. Van Loveren, what opinion do you have as to – within the context of that affidavit – let me rephrase this. Do you have an opinion whether Dr. Van Loveren's care fell below the accepted standard of care?

{¶28} "A. I don't believe his did, no.

{¶29} "Q. And you have no other opinions as to the standard of care by Dr. Van Loveren outside of what's stated in the affidavits?

{¶30} "A. That's true. That's correct."

{¶31} Thus, Dr. Rutberg testified that his opinions were limited to those set forth in his affidavits, and when asked whether Dr. Van Loveren's care fell below the accepted standards, he testified that it did not. Fisher attempts to cloud the issue with a CT scan that was conducted on December 24, 1990. But Dr. Rutberg's testimony does not support Fisher's assertions; rather, it affirmatively demonstrates the absence of evidence on this issue. As a result, we find her first argument meritless.

{¶32} Fisher next argues that Dr. Van Loveren could have been held vicariously liable for the acts or omissions of Dr. Osborne and Dr. Mullen on December

24, 1990, because as the attending physician he had the ultimate responsibility for her care. Fisher cites a number of cases to support her argument, but they are all factually distinguishable in that the attending physician in each was made aware of what was going on and did not intervene.[5]

{¶33} Here, the record reveals that Dr. Van Loveren was not made aware of any problems with Fisher until very late in the evening on December 24, 1990, and that after being contacted, he arrived at the hospital within approximately 15 minutes.[6] Fisher's expert, Dr. Rutberg, testified that upon his arrival, Dr. Van Loveren took appropriate measures in treating Fisher. Consequently, Dr. Van Loveren was entitled to summary judgment on this argument as well.

{¶34} Furthermore, to the extent that Fisher claims all the defendants should have remained in this case because there had been deposition references to "team" treatment, Dr. Rutberg's opinions given in his

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[5] See *Baird v. Sickler* (1982), 69 Ohio St.2d 652, 433 N.E.2d 593 (where the supreme court held that surgeon could be subjected to vicarious liability for a nurse anesthetist where the surgeon testified not only that he instructed and watched the intubation of the patient, but also that he had "the right and duty to halt the procedure" if he thought something was being done improperly; but the court expressly refused to breathe new life into the "captain of the ship" doctrine).

[6] See *Ferguson v. Dyer*, 149 Ohio App.3d 380, 385-386, 2002-Ohio-1442, 777 N.E.2d 850 (noting that "in Ohio, nearly all the cases examining physician liability [in this context] have been decided on facts in which the physician was exercising direct, personal, and proximate supervision over the hospital employee whose negligence might be imputed to the physician").

deposition and affidavits do not reflect that he agreed with such an assertion. Dr. Rutberg referred to the conduct and actions of specific parties and did not render opinions against the "team." Consequently, the trial court did not err in failing to find a genuine issue of material fact as to this issue.

{¶35} Fisher next contends that Dr. Van Loveren was negligent in failing to dictate the operative note. But the record reveals that Dr. Mullen, the resident doctor involved in the surgery, had the responsibility of dictating the operative note. Dr. Van Loveren testified that as soon as he learned that Dr. Mullen had not dictated the operative note, he contacted Dr. Mullen. When Dr. Mullen refused to dictate the operative report, Dr. Van Loveren dictated the note himself.

{¶36} Fisher's expert, Dr. Rutberg, acknowledged that it was acceptable practice to require a resident to prepare the operative note in a teaching hospital and that it was acceptable for a doctor to rely on the resident and the hospital to make sure an operative report was prepared, or for the hospital to notify the doctor if a report was not prepared. Dr. Rutberg further testified that the late preparation of the operative note had no causal relationship to any injury Fisher had suffered on December 24. Thus, based upon testimony from Fisher's own expert, the alleged failure to dictate the operative report was a separate and unrelated event to the malpractice on December 24 that had allegedly resulted in injury to Fisher and could not, therefore, have created an issue of fact related to Dr. Van Loveren.

{¶37} Likewise, Fisher's effort to liken Dr. Van Loveren's alleged failure to timely dictate the operative report to the "alteration" or "destruction" of medical records in *Moskovitz v. Mt. Sinai Med. Ctr.*[7] is not supported by the evidence of record. In *Moskovitz*, the discovery process produced documentation and deposition testimony that indicated that the defendant physician in that case, Dr. Figgie, had "whited-out" incriminating portions of his original office chart, added exculpatory language to his original office chart and then made copies of the "new" chart, and destroyed his original chart to conceal his failure to detect the plaintiff's cancer and to place blame on the plaintiff.[8] Thus, the discovery testimony from the various witnesses and the "new" office chart and other records were facially contradictory.[9]

{¶38} Here, there was no evidence in the discovery testimony or documentation to indicate anything more than a late dictation of the operative note. There was no evidence that the operative report did not accurately reflect the surgery. Moreover, the plaintiff's allegations in *Moskovitz* were directed to the care and treatment provided during the office visit for which the records were altered. Here, based upon the opinions and testimony of Dr. Rutberg, Fisher's allegations of deviations resulting in injury to her were wholly separate from and not affected by the lapse in preparing an operative note regarding the surgery. Thus, based upon the record and the expert opinion of

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[7] 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331.

[8] Id. at 639-649.

[9] Id.

Dr. Rutberg, there was no issue of fact as to the operative note.

{¶39} Because Fisher failed to present any expert evidence that Dr. Van Loveren had deviated from the standard of care, he was entitled to summary judgment on her claims.[10] Mayfield Neurological Institute was likewise entitled to summary judgment, as Fisher's only claim against it was based upon the doctrine of respondeat superior.[11] As a result, we overrule Fisher's first assignment of error.

II. Dr. Osborne

{¶40} In her second assignment of error, Fisher argues that the trial court erred in granting summary judgment to Dr. Osborne and his employer, Good Samaritan Hospital.

{¶41} It is undisputed that Dr. Osborne was employed as a first-year resident at Good Samaritan Hospital and was paid a stipend for his work. In his deposition, Dr. Rutberg affirmatively averred that Dr. Osborne had not deviated from any standard of care, as evidenced by the following excerpt from his deposition testimony:

{¶42} "Q. I want to get this very clear sir, as to who you think fell below the standard of care in the

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[10] *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 131, 346 N.E.2d 673.

[11] *Wells v. Spirit Fabricating Ltd.* (1996), 113 Ohio App.3d 282, 294, 680 N.E.2d 1046.

management of this patient. Was it Dr. Osborne or was it Dr. Mullen?

{¶43} "A. Primarily Dr. Mullen.

{¶44} "Q. Do you have any criticisms, then of Dr. Osborne that you feel fell below the standard of care?

{¶45} "A. Thinking about it and realizing that he was just a „lowly intern,' no, no. It is Dr. Mullen primarily.

{¶46} "Q. I understand, now, that you do not feel that Dr. Osborne fell below the standard of care, but rather Dr. Mullen fell below the standard of care, is that correct?

{¶47} "A. Yes, sir. * * *"

{¶48} Fisher nonetheless argues that testimony by a Good Samaritan nurse, Kathleen Athanas, that she had to convince Dr. Osborne to call Dr. Mullen on the evening of December 24 created a genuine issue of material fact as to Dr. Osborne's liability. But when Dr. Rutberg was asked about the nurse's testimony in his deposition, he stated as follows:

{¶49} "A. Well I understand that Dr. Osborne had to be convinced to call the attending, if I understand correctly, by the nurse, and apparently he wasn't going to call the attending. This is what I am led to believe. I don't have that in the chart here. If this is the case, then he didn't recognize the dire circumstances.

{¶50} "Q. Are you guessing sir?

{¶51} "A. Yes, I am guessing. It is hearsay. That is why I stand by what I said before.

{¶52} "Q. Based on what you have in the records sir, aside from your guessing which we don't want you to do, based on what's in the records, do you believe that Dr. Osborne deviated from the standard of care?

{¶53} "A. No, I don't. I am troubled by this, but I don't."

{¶54} Thus, contrary to Fisher's assertions, her own expert testified that he had found no breach in the standard of care by Dr. Osborne. Fisher, furthermore, could not have utilized the deposition testimony of Nurse Athanas to establish any deviation from the standard of care by Dr. Osborne.[12] Because the expert testimony presented by Fisher failed to create a triable issue of fact as to whether Dr. Osborne had deviated from the appropriate standard of medical care, the trial court correctly granted summary judgment on Fisher's claim against Dr. Osborne and his employer, Good Samaritan Hospital. We, therefore, overrule her second assignment of error.

III. Good Samaritan Hospital

{¶55} In her third assignment of error, Fisher argues that the trial court erred in granting summary judgment to Good Samaritan Hospital on the basis of

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[12] See *Morris v. Children's Hosp. Med. Ctr.* (1991), 73 Ohio App.3d 437, 444, 597 N.E.2d 1110; *Daly v. Hess*, 2nd Dist. No. 22048, 2008-Ohio-2884,¶21.

the Ohio Supreme Court's decision in *Comer v. Risko*.[13] In her fourth assignment of error, she argues that the trial court's entry of summary judgment for Good Samaritan Hospital violated her constitutional right to a jury trial. Because these assignments of error are interrelated, we address them together.

{¶56} In *Comer v. Risko*, a plaintiff sued a hospital, claiming that two physicians, who it alleged were its agents, had committed malpractice.[14] The plaintiff, however, did not sue the two physicians who had allegedly committed the malpractice. She only sued the hospital.[15] After the statute of limitations on the plaintiff's unasserted malpractice claims had expired, the trial court granted the hospital's motion for summary judgment.[16] The Ohio Supreme Court held that the plaintiff's claim against a hospital for the negligence of an independent-contractor physician was a derivative claim of vicarious liability and that, under established principles of Ohio law, the claim against the hospital for secondary liability necessarily failed if the statute of limitations had expired on the claim against the physician who was allegedly primarily negligent.[17]

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[13] 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712.

[14] 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712.

[15] Id. at ¶9.

[16] Id. at ¶5.

[17] 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, at paragraphs one and two of the syllabus.

{¶57} In granting Good Samaritan's motion for summary judgment, the trial court in this case found that if any agency relationship had existed between Dr. Mullen and Good Samaritan Hospital, it was the "fictional" relationship of agency by estoppel. Based on our review of the record, we agree with the trial court's determination. At the time of the alleged negligence, the University of Cincinnati maintained the only neurosurgical program in the area. Attending physicians from University Hospital supervised University of Cincinnati neurosurgical residents who rotated through Good Samaritan Hospital. Good Samaritan Hospital contracted with the University of Cincinnati to provide neurological services at Good Samaritan Hospital when Fisher was a patient.

{¶58} The Court of Claims held, and the Tenth Appellate District affirmed its determination, that Dr. Mullen was not an employee of Good Samaritan Hospital at the time of the alleged negligence. Rather, he was a University of Cincinnati employee. The University of Cincinnati, furthermore, was an independent contractor of Good Samaritan Hospital with respect to providing neurological services.

{¶59} Fisher now argues that *Comer* does not apply because Dr. Mullen was an actual agent of Good Samaritan. But the evidence in the record does not support Fisher's argument. Fisher, herself, maintained throughout the litigation that Dr. Mullen was an "apparent" agent of Good Samaritan. In an affidavit attached to her memorandum opposing summary judgment, Fisher parroted the necessary language for an agency-by-estoppel claim, stating that "at no time did Dr. Mullen or anyone on behalf of Good Samaritan Hospital inform me that Dr. Mullen was not an

employee or agent of Good Samaritan Hospital. * * * I believed Dr. Mullen was employed by Good Samaritan Hospital since that is where I had contact with him." Consequently, we cannot conclude that the trial court erred in granting summary judgment to Good Samaritan Hospital on the basis of the *Comer* decision. We, therefore, overrule Fisher's third assignment of error.

{¶60} Finally, Fisher argues that the trial court's entry of summary judgment for Good Samaritan Hospital violated her constitutional right to a jury trial based upon this court's decision in *Vanderpool v. University Hospital.*[18] She argues that, in *Vanderpool,* this court held that a private hospital may be vicariously liable, under respondeat superior, for the acts of its agents, even if the agents are immune from personal liability pursuant to a statute. Consequently, she asserts that she could have maintained her claim against Good Samaritan even though Dr. Mullen had been found to be personally immune from suit. We disagree.

{¶61} *Vanderpool* did not provide Fisher with a right of recovery against Good Samaritan Hospital for two reasons. First, *Vanderpool* was decided before the Ohio Supreme Court's decision in *Comer*. Second, it is factually distinguishable. Central to our holding in *Vanderpool* was the fact that the plaintiff in that case had sought out the clinic of a private hospital for treatment, and had looked to the clinic, rather than any specific doctor, for her care. Here, Fisher had been treating with Dr. Van Loveren and had gone to Good

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[18] 1st Dist. No. C-020020, 2002-Ohio-5092.

Samaritan based upon her relationship with him. Thus, Fisher's claims against Good Samaritan Hospital were more analogous to the claims in *Comer*. Because Fisher's claims against Good Samaritan Hospital were not viable under *Comer* and were factually distinguishable from the claims in *Vanderpool,* she had no right to any trial against Good Samaritan Hospital, let alone a jury trial. As a result, we overrule her fourth assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

DINKELACKER and **WINKLER, JJ.,** concur.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

APPENDIX B

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A9111015

[Filed March 1, 2007]

DEBORAH L. FISHER,	)
	)
Plaintiff,	)
	)
v.	)
	)
GOOD SAMARITAN HOSPITAL, et al.,	)
	)
Defendants.	)
	)

Judge John Andrew West

ORDER AND OPINION GRANTING MOTION TO RECONSIDER, AND GRANTING MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on Good Samaritan Hospital's ("Defendant") "Motion for Reconsideration of Defendant, Good Samaritan Hospital's, Motion for Summary Judgment in Light of New Authority." After hearing oral arguments and reviewing the written memoranda presented by the

parties, the Court finds that Defendant's Motion is well taken.

Summary Judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[1] The burden is upon the party moving for summary judgment to identify "those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims."[2] Whether a genuine issue of material fact exists depends on whether the evidence presents "a sufficient disagreement to require submission to a jury" or whether it is so "one-sided that one party must prevail as a matter of law."[3] Furthermore, the evidence must be construed in the light most favorable to the nonmoving party.[4] When a motion for summary judgment is made and supported by evidence showing that there is no issue of material fact, the nonmoving party then has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial.[5] If the nonmovant does not so respond, summary judgment shall be entered against the nonmoving party.[6]

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[1] / OHIO R. CIV. P. 56(C).

[2] / *Dresher v. Burt* (1996),75 Ohio St.3d 280, 293.

[3] / *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340.

[4] / *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 617.

[5] / *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429.

[6] / *Id.*

Defendant argues that this Court should reconsider its decision rendered August 19, 2005 in light of *Comer v. Risko*.[7] *In Comer,* the Ohio Supreme Court held that "agency by estoppel is a derivative claim of vicarious liability whereby the liability of the hospital must flow through the independent-contractor physician. Consequently, there can be no viable claim for agency by estoppel if the statute of limitations against the independent-contractor physician has expired"[8] Because Dr. Mullen's liability was extinguished by the Court of Claims, Defendant asserts that there is no source upon which the Court can impose secondary liability on Defendant.

Plaintiff argues that this matter is distinct from the facts underlying *Comer*, because this matter involves actual agency rather than agency by estoppel. Plaintiff has cited to no evidence in support of her contention. In fact, the facts asserted in Plaintiff's affidavit support the proposition that this matter involves agency by estoppel. In her affidavit, Plaintiff states:

> At no time did Dr. Mullen or anyone on behalf of Good Samaritan Hospital inform me that Dr. Mullen was not an employee or agent of Good Samaritan Hospital. . . . I *believed* that Dr. Mullen was employed by Good Samaritan Hospital since that is where I had contact with him."[9]

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[7] / (2005), 106 Ohio St.3d 185.

[8] / *Id.* at 191.

[9] / Aff. of Pl., Deborah L. Fisher, at ¶ 4 [emphasis added].

Moreover, the affidavit of Thomas Saladin, M.D., Vice President of Academic Affairs at TriHealth, Inc., supports the proposition that this matter involves agency by estoppel. In his affidavit, Dr. Saladin states:

> The University of Cincinnati maintained the only neurosurgical residency program in this area in 1990 and 1991. Attending physicians form University Hospital supervised University of Cincinnati neurosurgical residents who rotated through Good Samaritan Hospital at that time.[10] Good Samaritan Hospital contracted with the University of Cincinnati to provide neurosurgical services at Good Samaritan Hospital when Deborah Fisher was a patient on or about December 20, 1990 through January 8, 1991.[11] Dr. Bradley Mullen was not an employee of Good Samaritan Hospital; rather, he was an employee with the University of Cincinnati at the time treatment was provided to Deborah Fisher.[12] On or about December 20, 1990 through January 8, 1991, the University of Cincinnati was an independent contractor for purposes of providing neurosurgical services to patients at Good Samaritan Hospital.[13]

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[10] / Aff. of Thomas Saldin, M.D., at ¶ 3.

[11] / *Id.* at ¶ 4.

[12] / *Id.* at ¶ 5.

[13] / *Id.* at ¶ 6.

In the August 19, 2006 decision, this Court determined that "genuine issues of material fact exist as to whether or not an *apparent* agency relationship existed between Dr. Mullen and Defendant, and whether or not Good Samaritan Hospital is vicariously liable for Dr. Mullen's potential malpractice."[14] Dr. Mullens' liability has been extinguished. As stated by the Ohio Supreme Court in *Comer*, "in the absence of the tortfeasor's primary liability, there is no liability that may flow through to the hospital on an agency theory."[15]

Construing the evidence in the light most favorable to Plaintiff, reasonable minds can come to but one conclusion and that conclusion is adverse to Plaintiff. The Court finds that there are no genuine issues of material fact and that Defendant is entitled to judgment as a matter of law. Defendant's Motion for Summary Judgment is hereby GRANTED. Plaintiff's complaint is hereby dismissed with prejudice. Defendants shall recover from Plaintiff their costs of action.

This entry constitutes a final, appealable order. There is no just reason for delay.

Be it so Ordered.

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[14] / Nunc Pro Tunc Mem. of Decision and Order, at 3 [emphasis added].

[15] / 106 Ohio St.3d at 191.

Date: 3-1-07

/s/
Judge John Andrew West

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A9111015

[Filed August 19, 2005]

DEBORAH L. FISHER,	)
	)
Plaintiff,	)
	)
v.	)
	)
GOOD SAMARITAN HOSPITAL, et al.,	)
	)
Defendants.	)
	)

NUNC PRO TUNC MEMORANDUM OF DECISION AND ORDER

This matter came before the Court on Good Samaritan Hospital ("Defendant's") Motion for Summary Judgment. After hearing oral arguments and reviewing the written memorandum presented by the parties, the Court finds that Defendant's Motion is not well taken and is therefore denied.

This matter arises out of the alleged medical malpractice of Brad Mullen, M.D.

Summary Judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. **Ohio Rule Civ. P. 56**.

When a motion for summary judgment is made and supported by evidence showing that there is no issue of material fact, "the nonmoving party then has a reciprocal burden . . . to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." **(1997) *Vahila v. Hall*, 77 Ohio St. 3d 421, 429, 674 N.E. 2d 1164, 1171.**

As a preliminary matter, Plaintiff requests that this Court reconsider a decision rendered by Judge Kraft in 1997 granting summary judgment to other defendants that were a party to this action. The Court finds that this request is not well taken and is therefore denied.

Plaintiff's claim against Defendant is a claim for vicarious liability for the alleged tortious conduct of Dr. Mullen. The Court of Claims has previously found that Dr. Mullen was a state employee, acting within the scope of his employment with the University of Cincinnati Medical Center when he treated Plaintiff herein, and that he was, therefore, entitled to personal immunity for medical malpractice allegedly committed while Dr. Mullen treated Plaintiff. The decision of the Court of Claims was affirmed by the Court of Appeals of Ohio Tenth Appellate District. Defendant argues that Plaintiff's claim against Defendant under respondeat superior should be dismissed from this action because Dr. Mullen was found to be an

employee of the University of Cincinnati Medical Center when he treated Plaintiff.

In a decision rendered by Judge Kraft on February 13th, 1998, the Judge wrote, ".. there is a triable issue of fact as to the liability of Good Samaritan for the actions of Dr. Mullen. Despite the uncontested fact that Dr. Mullen was an employee, not of Good Samaritan, but of the State of Ohio, there remains an apparent agency between Dr. Mullen and Good Samaritan which is sufficient to overcome summary judgment. As it appeared to plaintiffs at the time of the incident in question that Dr. Mullen was an employee of Good Samaritan, and as Good Samaritan arguably had the right of control over and responsibility for Dr. Mullen's actions at that time, Good Samaritan may be vicariously liable for Dr. Mullen's potential malpractice....Good Samaritan has an avenue of relief against Dr. Mullen as primary tortfeasor, by working through the Court of Claims. Dr. Mullen, a state employee may be sued in the Court of Claims by Good Samaritan, as well as by the original plaintiffs in this action...Thus, Good Samaritan is incorrect in its assertions that a judgment against it in this Court would leave it without recourse against Dr. Mullen, the alleged primary tortfeasor in this case .... Good Samaritan is a proper defendant in this case, and any potential subrogation or indemnity issues should be resolved between the defendants, without depriving the plaintiffs of any cause of action."

Judge Kraft found that a genuine issue of material fact existed as to the liability of Good Samaritan for the actions of Dr. Mullen even though Dr. Mullen was an employee, not of Good Samaritan, but of the State

of Ohio. Defendant is attempting to reargue an issue that Judge Kraft has previously decided upon. Therefore, summary judgment in favor of Defendant and against Plaintiff is inappropriate.

In construing the arguments of Defendant most favorably towards Plaintiff, the nonmoving party, reasonable minds could draw different conclusions from undisputed facts. The Court finds that, in accordance with the decision rendered by Judge Kraft herein, genuine issues of material fact exist as to whether or not an apparent agency relationship existed between Dr. Mullen and Defendant, and whether or not Good Samaritan is vicariously liable for Dr. Mullen's potential malpractice. Therefore, Defendant's Motion for Summary Judgment is DENIED.

IT IS FURTHER THE ORDER OF THE COURT that the parties herein are to appear before the Court for Report on September 9th, 2005 at 1:45 p.m. to set this matter for trial.

SO ORDERED.

DATE: 8-18-05 /s/
Judge John Andrew West

APPENDIX D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A9111015

[Filed August 12, 2005]

DEBORAH L. FISHER,	)
	)
Plaintiff,	)
	)
v.	)
	)
GOOD SAMARITAN HOSPITAL, et al.,	)
	)
Defendants.	)
	)

Judge John Andrew West

MEMORANDUM OF DECISION AND ORDER

This matter came before the Court on Good Samaritan Hospital ("Defendant's") Motion for Summary Judgment. After hearing oral arguments and reviewing the written memorandum presented by the parties, the Court finds that Defendant's Motion is well taken and is therefore granted.

This matter arises out of the alleged medical malpractice of Brad Mullen, M.D.

Summary Judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. **Ohio Rule Civ. P. 56.**

When a motion for summary judgment is made and supported by evidence showing that there is no issue of material fact, "the nonmoving party then has a reciprocal burden . . . to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." **(1997) *Vahila v. Hall*, 77 Ohio St. 3d 421, 429, 674 N.E. 2d 1164, 1171.**

As a preliminary matter, Plaintiff requests that this Court reconsider a decision rendered by Judge Kraft in 1997 granting summary judgment to other defendants that were a party to this action. The Court finds that this request is not well taken and is therefore denied.

Plaintiff's claim against Defendant is a claim for vicarious liability for the alleged tortious conduct of Dr. Mullen. The Court of Claims has previously found that Dr. Mullen was a state employee, acting within the scope of his employment with the University of Cincinnati Medical Center when he treated Plaintiff herein, and that he was, therefore, entitled to personal immunity for medical malpractice allegedly committed while Dr. Mullen treated Plaintiff. The decision of the Court of Claims was affirmed by the Court of Appeals of Ohio Tenth Appellate District. Defendant argues that Plaintiff's claim against Defendant under respondeat superior should be dismissed from this action because Dr. Mullen was found to be an

employee of the University of Cincinnati Medical Center when he treated Plaintiff.

In a decision rendered by Judge Kraft on February 13th, 1998, the Judge wrote, "...there is a triable issue of fact as to the liability of Good Samaritan for the actions of Dr. Mullen. Despite the uncontested fact that Dr. Mullen was an employee, not of Good Samaritan, but of the State of Ohio, there remains an apparent agency between Dr. Mullen and Good Samaritan which is sufficient to overcome summary judgment. As it appeared to plaintiffs at the time of the incident in question that Dr. Mullen was an employee of Good Samaritan, and as Good Samaritan arguably had the right of control over and responsibility for Dr. Mullen's actions at that time, Good Samaritan may be vicariously liable for Dr. Mullen's potential malpractice....Good Samaritan has an avenue of relief as against Dr. Mullen as primary tortfeasor, by working through the Court of Claims. Dr. Mullen, a state employee may be sued in the Court of Claims by Good Samaritan, as well as by the original plaintiffs in this action...Thus, Good Samaritan is incorrect in its assertions that a judgment against it in this Court would leave it without recourse against Dr. Mullen, the alleged primary tortfeasor in this case....Good Samaritan is a proper defendant in this case, and any potential subrogation or indemnity issues should be resolved between the defendants, without depriving the plaintiffs of any cause of action."

Judge Kraft found that a genuine issue of material fact existed as to the liability of Good Samaritan for the actions of Dr. Mullen even though Dr. Mullen was an employee, not of Good Samaritan, but of the State

of Ohio. Defendant is attempting to reargue an issue that Judge Kraft has previously decided upon. Therefore, summary judgment in favor of Defendant and against Plaintiff is inappropriate.

In construing the arguments of Defendant most favorably towards Plaintiff, the nonmoving party, reasonable minds could draw different conclusions from undisputed facts. The Court finds that, in accordance with the decision rendered by Judge Kraft herein, genuine issues of material fact exist as to whether or not an apparent agency relationship existed between Dr. Mullen and Defendant, and whether or not Good Samaritan is vicariously liable for Dr. Mullen's potential malpractice. Therefore, Defendant's Motion for Summary Judgment is DENIED.

IT IS FURTHER THE ORDER OF THE COURT that the parties herein are to appear before the Court for Report on September 9th, 2005 at 1:45 p.m. to set this matter for trial.

SO ORDERED.

DATE: 8-12-05 /s/
Judge John Andrew West

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No: A9111015

[Filed April 28, 1998]

DEBORAH L. FISHER,	)
	)
Plaintiff,	)
	)
v.	)
	)
GOOD SAMARITAN HOSPITAL, et al.,	)
	)
Defendants.	)
	)

(Judge Kraft)

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR RELIEF FROM JUDGMENT (Civ. R. 60)

This matter came before the Court on plaintiff's Motion for Reconsideration and/or Relief from Judgment (Civ. R. 60), and having reviewed all memoranda filed on behalf of and in opposition to said Motion, and reviewing the record, including all affidavits and depositions filed, the Court hereby holds that the Motion is denied and that the Order Granting

Motion for Summary Judgment which was filed on May 21, 1997 remains in full force and effect.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Motion for Reconsideration and/or Relief from Judgment (Civ. R. 60) is hereby denied, and the previous Order Granting Motion for Summary Judgment entered on May 21, 1997 remains in full force and effect.

IT IS SO ORDERED.

_____

Robert S. Kraft, Judge
Hamilton County Court of Common Pleas

_____

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_____

Ann Ruley Combs (0004810)
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/s/ _____

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Attorney for Defendants, Good Samaritan Hospital
and Brad Osborne, M.D.
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APPENDIX F

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A9111015

[Filed April 28, 1998]

DEBORAH L. FISHER, et al.	)
	)
Plaintiffs	)
	)
v.	)
	)
GOOD SAMARITAN HOSPITAL, et al.,	)
	)
Defendants.	)
	)

Judge Kraft

ENTRY GRANTING DEFENDANTS, HARRY VAN LOVEREN, M.D. AND MAYFIELD NEUROLOGICAL INSTITUTE, INC.'S MOTION FOR SUMMARY JUDGEMENT.

This matter came before the Court on Defendants' Motion for Summary Judgement pursuant to Rule 56 of the Ohio Rules of Civil Procedure and Plaintiff's Motion for Reconsideration thereof. The Court, having reviewed the motion, memoranda, affidavits and depositions filed thereon and having considered the

same, hereby finds that Defendants, Harry Van Loveren, M.D. and Mayfield Neurological Institute, Inc.'s Motion for Summary is well taken and therefore ORDERS:

That Defendants' Motion for Summary Judgement be and is hereby granted and Defendants, Harry Van Loveren, M.D. and Mayfield Neurological Institute, Inc. are hereby dismissed thereon.

_____
Judge Kraft

/s/_____
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* * *

[Certificate of Service omitted in this appendix]

APPENDIX G

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A9111015

[February 13, 1998]

DEBORAH L. FISHER, et al.	)
	)
Plaintiff	)
	)
-v-	)
	)
GOOD SAMARITAN HOSPITAL, et al.	)
	)
Defendant	)
	)

MEMORANDUM OF DECISION

Kraft, J.:

This matter is before the Court on the plaintiffs' motion to reconsider the Court's opinion granting summary judgment, filed May 7, 1997 and on the defendant, Good Samaritan Hospital's ("Good Samaritan") supplemental motion for summary judgment, filed August 22, 1997. These motions were finally submitted on October 1, 1997. Each motion is hereby DENIED as more fully discussed below.

This is a medical malpractice case, wherein the plaintiff, Deborah Fisher (Fisher), sustained injury while hospitalized at Good Samaritan. She underwent surgery, performed by Harry Van Loveren, M.D. ("Dr. Van Loveren"), an employee of Mayfield Neurological Clinic ("Mayfield). During her post-operative period, she was under the care of, besides Dr. Van Loveren, the following persons: Brad Osborne, M.D. (Dr. Osborne"), a first year resident at Good Samaritan; Brad Mullen, M.D. ("Dr. Mullen"), the chief neurological resident at Good Samaritan and an employee of the University of Cincinnati; and the nursing staff of Good Samaritan. The plaintiffs brought suit against Drs. Van Loveren, Osborne, and Mullen, and against Mayfield and Good Samaritan. Dr. Mullen was dismissed from the case due to his immunity status as an employee of the state of Ohio and an action is pending against him in the Court of Claims. After lengthy discovery, all of the remaining defendants eventually moved for summary judgment.

On April 24, 1997, this Court granted summary judgment with respect to all of the defendants except for Good Samaritan. Having examined all of the evidence, including the deposition testimony and affidavits of the plaintiffs' expert witness, L. David Rutberg, M.D. ("Dr. Rutberg"), this Court concluded that there was no issue of triable fact as to the adequacy of the care provided by Dr. Van Loveren, Dr. Osborne, or the nursing staff of Good Samaritan. Summary judgment was granted as to Drs. Van Loveren and Osborne, as well as to Mayfield, as the only claim against Mayfield appears to have been predicated on the doctrine of respondeat superior. Because there was sufficient evidence to create a genuine issue of material fact as to the adequacy of the

care provided by Dr. Mullen, and because his status as chief neurological resident at Good Samaritan arguably creates and agency relationship with the hospital, summary judgment was denied as to Good Samaritan.

On May 7, 1997, plaintiffs moved this Court to reconsider its decision granting summary judgment or in the alternative for relief from judgment pursuant to Civ. R. 60. A motion to reconsider is governed by the following principles of law:

(1) An entry of judgment is governed by Civ. R. 58. Civ. R. 58(A) provides that judgment is effective *only* when entered by the clerk upon the journal. (emphasis added) *See also St. Vincent Charity Hospital v. Mintz*, 33 Ohio 3d 121 (1987).

(2) [I]n a trial court a motion for reconsideration is not allowed either expressly or implicitly after a final judgment. *Lorain Education Ass'n. v. Lorain Board of Education*, 46 Ohio St. 3d 12, 17 (1989)

(3) A motion for reconsideration filed after final entry of judgment is a nullity. *Pitts v. Ohio Dept. Transportation, et al.*, 67 Ohio St. 24 378 (1981) at syllabus.

(4) Prior to entry of final judgment a motion to reconsider or vacate an interlocutory decision is permissible, and the rule of *Pitts* is inapplicable (*Ohio Bar Liability Ins. Co. v. INA Underwriters Ins. Co.*, C-890651 (1st App. Dist. 11-7-1990) (unreported), *C.C.M. Enterprises, Inc. v. U.S. Fire Ins. Co.*, C-870193 (1st App. Dist. 3-2-1988) (unreported).

(5) An oral decision or a non-final entry of decision is interlocutory in character and is subject to modification at any time prior to final entry of judgment. *Scribner Corp. v. Schneider*, C-890603 (1st App. Dist. 4-24-1991) (unreported); *Ohio Bar Liability Ins. Co., supra*. Until final judgment is entered "the court has inherent power to reconsider any matter." *C.C.M. Enterprises, supra*. "[T]he trial court [can] modify, or even completely eliminate, any part or all of [a] decision at any time prior to the entry of final judgment." *Mason v. Schwartz*, 76 Ohio App. 3d 43 (Ottawa Co. 1991) (citing *Pitts*). *See also Bodo v. Nationwide Insurance Co.*, 75 Ohio App. 3d 499, 503-04 (Trumbull Co. 1991) (motion for reconsideration proper under 54(B) for interlocutory orders prior to final judgment entry).

As no final judgment has yet been filed, a motion to reconsider is properly before the Court. On further review, however, it appears that the plaintiffs have raised no new issues, arguments, or evidence in their motion or supporting memoranda. Instead, they have argued that summary judgment should be denied based on the assertion, which the Court does not doubt, that this has been an expensive case to litigate and that a need to seek reversal at the appellate level, as has been accomplished by counsel in an unrelated case, will create significant and devastating expense. With all due respect to counsel's competence in the area of his expertise, ie, medical malpractice, nonetheless, the Court thoroughly considered all aspects of the case when it ruled on the original summary judgment motions and is not persuaded that it decided wrongly. Expert testimony is required to sustain an action for medical malpractice *(see Clark v. Doe*, (April 23, 1997), Hamilton App. No. C-950667,

unreported, citing *Bruni v. Tatsumi*, (1976), 46 Ohio. St. 2d 127), and the expert testimony presented by the plaintiffs failed to create a triable issue of fact as to a deviation from the standard of care of any defendant except for Dr. Brad Mullen, and Good Samaritan Hospital, via respondeat superior.

The Court now turns to Good Samaritan's supplemental motion for summary judgment. Good Samaritan has contended 1) that it is not vicariously liable for the actions of Dr. Mullen, because he was employed by the state, not Good Samaritan, and 2) that it would be without recourse against Dr. Mullen as the primary tortfeasor, should the plaintiffs win a judgment against it in this Court. Neither of these arguments is well-taken.

First, there is a triable issue of fact as to the liability of Good Samaritan for the actions of Dr. Mullen. Despite the uncontested fact that Dr. Mullen was an employee, not of Good Samaritan, but of the State of Ohio, there remains an apparent agency between Dr. Mullen and Good Samaritan which is sufficient to overcome summary judgment. As it appeared to the plaintiffs at the time of the incident in question that Dr. Mullen was an employee of Good Samaritan, and as Good Samaritan arguably had the right of control over and responsibility for Dr. Mullen's actions at that time, Good Samaritan may be vicariously liable for Dr. Mullen's potential malpractice. *See Clark v. Southview Hospital*, (1994), 68 Ohio St. 3d 435, 628 N.E. 2d 46; *Morris v. Children's Hospital Medical Center*, (1st. Dist., 1991), 73 Ohio App. 3d 437, 597 N.E. 2d 1110.

Second, Good Samaritan has an avenue of relief as against Dr. Mullen as primary tortfeasor, by working through the Court of Claims. Dr. Mullen, a state employee may be sued in the Court of Claims by Good Samaritan, as well as by the original plaintiffs in this action. Further, any case in which a state employee is a third-party defendant may be removed to the Court of Claims. *See* R.C. 2743.03(E). Thus, Good Samaritan is incorrect in its assertions that a judgment against it in this Court would leave it without recourse against Dr. Mullen, the alleged primary tortfeasor in this case. On the other hand, the plaintiffs may not sue Good Samaritan in the Court of Claims (*see* R.C. 2743.02(E)), leaving this Court as the only avenue of relief for the plaintiffs as against Good Samaritan in respondeat superior. Good Samaritan is a proper defendant in this case, and any potential subrogation or indemnity issues should be resolved between the defendants, without depriving the plaintiffs of any cause of action.

Please present an entry accordingly and appear for report on the 16th day of March, 1998, at 9:00 a.m.

APPEARANCES:

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APPENDIX H

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No: A-91-11015

[May 21, 1997]

DEBORAH L. FISHER,

Plaintiff

v.

GOOD SAMARITAN HOSPITAL, et al.

Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter corning before the Court on the Motion for Summary Judgment on behalf of defendants, Good Samaritan Hospital and Brad Osborne, M.D., having reviewed all Memoranda filed on behalf of and in opposition to said Motion, and reviewing the record, including the deposition of L. David Rutberg, M.D., plaintiffs expert witness, the Court hereby holds that the Motion is well taken as to defendants Brad Osborne, M.D. and the conduct of any and all nursing

staff and other employees of the Good Samaritan Hospital.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion of defendants, Good Samaritan Hospital and Brad Osborne, M.D., is hereby granted as to Dr. Osborne in total, and as to the conduct of the nurses and other agents and employees of Good Samaritan Hospital. However, since Dr. Rutberg's testimony suggests a deviation on the part of Dr. Mullen which arguably creates a *respondeat superior* liability issue as to Good-Samaritan Hospital, the Motion is denied as it relates to Dr. Mullen and Good Samaritan Hospital until further motions/memoranda have been filed and ruled upon.

IT IS SO ORDERED.

_____

Robert S., Kraft, Judge
Hamilton County Court of Common Pleas

Tendered to Mr. Metz on 5/12/97
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Pursuant to telephone authorization granted 5/21/97
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APPENDIX I

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A-9111015

[April 24, 1997]

DEBORAH FISHER, et al.	)
	)
Plaintiffs	)
	)
-v-	)
	)
HARRY VAN LOVEREN, M.D., et al.	)
	)
Defendants	)
	)

MEMORANDUM OF DECISION

Kraft, J.:

This matter is before the Court on the motions for summary judgment of the defendants Good Samaritan Hospital ("Good Samaritan") and Brad Osborne, M.D. ("Dr. Osborne"), originally filed March 7, 1995 and renewed February 5, 1996, and the defendants Harry Van Loveren, M.D. ("Dr. Van Loveren") and Mayfield Neurological Institute, Inc. ("Mayfield"), filed February 15, 1996. The motions were held in abeyance in order to allow the plaintiffs to complete their discovery and

were finally submitted without argument on February 14, 1997.

Summary judgment is appropriate when there are no genuine issues of material fact that remain to be litigated and the moving party is entitled to judgment as a matter of law. Civ. R. 56(C); *Celotex Corp. v. Catrett,* (1986), 477 U.S. 317, 327; *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St. 3d 344; *Williams v. 312 Walnut Ltd. Partnership* (Dec. 31, 1996), Hamilton App. No. C-960368, unreported. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, if any, timely filed in the action and construed most strongly in favor of the non-moving party, show that there is no genuine issue as to any material fact. Civ. R. 56(C); *Welco, supra.*

The burden of establishing that the material facts are not in dispute, and that no genuine issue of fact exists, is on the party moving for summary judgment. *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112. If the moving party asserts that there is an absence of evidence to establish an essential element of the nonmoving party's claim, the moving party cannot discharge this burden with a conclusory allegation, but must specifically point to some part of the record which affirmatively demonstrates this absence of evidence. *Dresher v. Burt* (1996), 75 Ohio St. 3d 280.

Once a motion for summary judgment has been made and supported as provided in Civ. R. 56(C), the nonmoving party then has a reciprocal burden to set forth specific evidentiary facts showing the existence of a genuine issue for trial and cannot rest on the

allegations or denials in the pleadings. *Wing v. Anchor Media, Ltd. of Texas*, (1991), 59 Ohio St. 3d 108, 111. "Whether a genuine issue exists is answered by the following inquiry: Does the evidence present 'a sufficient disagreement to require submission to a jury' or is it 'so one-sided that one party must prevail as a matter of law[?].'" *Williams, supra* (citing *Turner v. Turner* (1993), 67 Ohio St. 3d 337, 340).

The within action is a medical malpractice action. The plaintiffs' complaint, filed December 17, 1991, alleges that the plaintiff Deborah L. Fisher ("Fisher") underwent neurosurgery on or about December 20, 1990 at the defendant Good Samaritan Hospital while under the care of the defendant Dr. Van Loveren. The complaint further alleges that on or about December 24, 1990, Fisher's neurological condition significantly deteriorated and the defendants failed to properly respond to her deteriorating condition and failed to render to her the appropriate standard of needed medical care.

On a procedural note, subsequent to the submission of the motions, the defendants Dr. Van Loveren and Mayfield filed a motion to strike certain affidavits of Gloria Wirthwine and Elaine Williams filed by the plaintiffs. The defendants submit that such affidavits are replete with hearsay and not based upon personal knowledge. Having reviewed the affidavits and construing all reasonable competing inferences in favor of the plaintiffs, the defendants' motion to strike the affidavits is denied and the Court has considered these affidavits in ruling on the defendants' summary judgment motions.

Turning then to the substance of the defendants' motions. At the time of Fisher's surgery, the defendant Dr. Van Loveren was a surgeon employed by the defendant Mayfield. The defendant Dr. Osborne was a first year surgical resident at the defendant Good Samaritan. The defendant Bradley Mullen, M.D. ("Dr. Mullen"), now dismissed from this action, was in the final year of his neurosurgical residency at the University of Cincinnati and was working as chief neurological resident at the defendant Good Samaritan.

The defendants contend that the plaintiffs have failed to present adequate expert testimony that they deviated from the appropriate standard of medical care. The defendants point out that although the plaintiffs have submitted affidavits from L. David Rutberg, M.D. ("Dr. Rutberg"), a licensed physician and neurosurgeon, indicating generally that the defendants failed to provide appropriate monitoring and surveillance to Fisher, his deposition testimony specifically negates such generalized conclusions as to Dr. Van Loveren and Dr. Osborne.

As to Dr. Van Loveren, Dr. Rutberg testified as follows:

> Q. Other than what is stated in the affidavits, do you believe that the care provided by Dr. Van Loveren was within accepted medical standards?
>
> A. Yes, sir.
>
> . . . .

Q. . . . Do you have an opinion whether Dr. van Loveren's care fell below the accepted standard of care?

A. I don't believe his did, no.

Depo. of Dr. Rutberg, at 44, 78.

As to Dr. Osborne, Dr. Rutberg testified as follows:

Q. I want to get this very clear, sir, as to who you think fell below the standard of care in the management of this patient. Was it Dr. Osborn or was it Dr. Mullen?

A. Primarily Dr. Mullen.

Q. Do you have any criticisms, then, of Dr. Osborn that you feel fell below the standard of care?

A. Thinking about it and realizing that he was just a, quote, "lowly intern", no, no. It is Dr. Mullen primarily.

Q. I understand, now, that you do not feel that Dr. Osborn fell below the standard of care, but rather that Dr. Mullen fell below the standard of care, is that correct?

A. Yes, sir.

. . . .

Q. Based on what you have in the records, sir, aside from your guessing, which we don't want you to do, based on what's in the records, do you feel that Dr. Osborn deviated from the standard of care?

A. No, I don't. I am troubled by this, but I don't.

Depo. of Dr. Rutberg, at 30-31, 80-81.

Based on Dr. Rutberg's testimony, notwithstanding his testimony to the contrary in his affidavits or elsewhere in his deposition, when asked for a bottom line conclusion as to whether or not Dr. Van Loveren or Dr. Osborne deviated from the appropriate standard of care, Dr. Rutberg's answer was always in the negative. Although the plaintiffs vigorously and adamantly argue that these defendants failed to exercise the appropriate standard of care, the testimony of the plaintiff's expert witness, Dr. Rutberg, clearly does not support the plaintiff's assertions and affirmatively demonstrates the absence of evidence on this issue.

In addition, the plaintiffs further allege that Dr. Van Loveren failed to timely dictate his operative report and that such failure deviated from the appropriate standard of medical care. However, even assuming this to be true, Dr. Rutberg specifically testified that the failure to timely dictate the report did not cause Fisher's injury and did not cause the failure of any of the doctors or nurses to monitor Fisher. Depo. of Dr. Rutberg, at 49.

Thus, recognizing that such expert testimony is necessary to sustain an action for medical malpractice, *see Clark v. Doe* (April 23, 1997), Hamilton App. No. C-950667, unreported (citing *Bruni v. Tatsumi* (1976), 46 Ohio St. 2d 127), and that the expert testimony presented by the plaintiffs fails to create a triable issue of fact on the issues relating to the appropriate standard of care and causation, the defendants'

motions are granted as to Dr. Van Loveren and Dr. Osborne. Along the same lines, as it appears that there is no independent basis for the plaintiffs' claim against Mayfield, other than its employment relationship with Dr. Van Loveren, the defendants' motions are also granted as to Mayfield.

Turning finally to the defendant Good Samaritan. As to Good Samaritan, Dr. Rutberg's testimony also suggests that the hospital's nursing staff did not deviate from the appropriate standard of care. *See* Depo. of Dr. Rutberg, at 17-18, 61. However, since Dr. Rutberg's testimony does suggest a deviation on the part of Dr. Mullen, and since his employment status with Good Samaritan as chief neurological resident arguably creates an agency relationship with Good Samaritan for the imposition of respondeat superior liability, the defendants' motion is denied as it relates to Good Samaritan.

Please present an entry accordingly and the remaining parties should appear for a report on the 7th day of May, 1997, at 9:00 a.m.

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Thomas M. Evans, Esq.
Attorney for Defendants Dr. Osborne
and Good Samaritan Hospital
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APPENDIX J

IN THE SUPREME COURT OF OHIO

Case No. 2008-1921

[Filed January 28, 2009]

Deborah Fisher	)
	)
v.	)
	)
Harry Van Loveren, M.D.,	)
Brad Osbourne, M.D.,	)
Mayfield Neurological Institute,	)
and Good Samaritan Hospital	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Hamilton County Court of Appeals; No. C070228)

/s/
THOMAS J. MOYER
Chief Justice